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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDIE O. COOPER,

Defendant and Appellant.

B214490

(Los Angeles County
Super. Ct. No. NA079743)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James M. Ideman, Judge. Reversed in part and affirmed in part.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Daniel R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer
and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Freddie Oliver Cooper was convicted of possession of marijuana for sale. He was given an enhanced prison sentence due to the jury's finding that the crime was gang related. In this appeal, he challenges the sufficiency of the evidence to support the gang enhancement. Because we agree that the enhancement was not supported by substantial evidence, we reverse the jury's finding and strike the enhancement.

PROCEDURAL BACKGROUND

By felony information filed October 23, 2008, appellant was charged with two counts of attempted first degree murder, two counts of assault with a firearm, two counts of assault with a semiautomatic firearm, and one count (count 5) with possession of marijuana for sale, in violation of Health and Safety Code section 11359. The information specially alleged, pursuant to Penal Code section 186.22, subdivision (b)(1),¹ that all seven counts were "committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in any criminal conduct by gang members."²

The jury convicted appellant of count 5, possession of marijuana for sale, and found true the special gang allegation. The jury acquitted appellant of the remaining six counts.

After denying appellant's motion for new trial, the court sentenced him to the upper term of three years, plus the upper gang enhancement of four years. Appellant filed a timely notice of appeal from the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The information differs from the language of Penal Code section 186.22, subdivision (b)(1), which is stated in the disjunctive. The court instructed the jury in the disjunctive language of the statute as follows: "It is alleged . . . that the crimes charged were committed for the benefit of, at the direction of or in association with a criminal street gang, with a specific intent to promote, further, or assist in a criminal conduct by gang members." However, the gang allegations in the verdict forms are stated in the conjunctive, as in the information.

FACTUAL SUMMARY

1. The Shooting

On March 4, 2007, Sidney G. and Jorge P. were shot by a man in a gray car similar to appellant's gray Scion TC. The victims' initial description of the shooter was of an older and heavier person. Later, both victims identified appellant's photograph as depicting the shooter. Sidney identified appellant in court as the shooter. Jorge claimed that he did not see the shooter, but acknowledged that he had identified a photograph of him.

Both victims testified that they had seen appellant before the shooting on Cruces Street in Wilmington. Cruces Street was located in an area known as "Ghost Town," which was well known for drug trafficking. Jorge admitted that he had gone to the area on several occasions to buy drugs. Sidney denied that he had been using or selling narcotics at the time of the shooting, but admitted that he had sold narcotics in the past, was on felony probation for possession, and had been charged with numerous probation violations.

2. Appellant's Arrest

On March 30, 2007, at approximately 5:30 a.m., appellant parked his gray car on Cruces Street. His passengers were Kyle T. and Jasmyne T. Los Angeles Police Officer Maligi Nua testified that he and his partner, Officer Halka, had made a traffic stop a short time earlier on the 1500 block of Cruces Street in or near Wilmington. While they were occupied with the traffic stop, they saw appellant's car pass them, make a U-turn, and park. At the conclusion of the traffic stop, appellant's car was gone, but they soon saw it again parked on the 1400 block of Cruces Street. The officers had seen appellant on Cruces Street on other occasions, and Officer Nua testified that he knew that appellant stayed or resided in the house on the corner, up the street "some distance" from where appellant had parked.

As the officers approached appellant's car, they smelled marijuana. The windows of the car were heavily tinted, and a sun shade covered the front window, making it

difficult to see inside. Officer Nua knocked on the passenger window and asked the occupants to roll down the window. After knocking several more times without response, he knocked again, and the female passenger rolled down the window. The front seat backs were in a reclining position, giving Officer Nua the impression that the occupants had been trying to hide from the police.

When the officers searched the car, they found a plastic bag of marijuana in the driver's side door storage compartment, a large sum of money in the center console, ammunition in a hidden compartment on the driver's side door, and some ski masks. The marijuana was packaged in nine "bindles" of equal amounts, and totaled 26.94 grams. The money was in miscellaneous small denominations totaling \$686. It had been stacked in a sloppy fashion, as though someone had been dropping it into the console. The ammunition consisted of a box of FC Luger brand .9-millimeter rounds for a handgun, and four loose rounds in a plastic bag.³

Based upon his past experiences with drug arrests in that neighborhood, the way the marijuana was packaged, the amount of currency and the way it was placed in the car, and the actions of the occupants, it was Officer Nua's opinion that appellant possessed the marijuana for sale.

3. Gang Expert Testimony

Los Angeles Police Officer Mark Maldonado testified as the prosecution's gang expert. He was familiar with the East Side Pain gang, also known as ESP or the Ghost Town Bloods, because it had been one of his primary responsibilities for years as a gang investigator. Officer Maldonado testified that the gang had approximately 80 members, red was the gang's primary color, and its common hand sign was a "B" for Blood. Gang members sometimes had "ESP" tattoos, and they spray-painted "ESP" as graffiti. The gang's territory, also known as Ghost Town, included the block on which appellant's father and three siblings lived. Appellant's father was a member of the gang.

³ The ammunition was the same size, brand, and color as the casings found at the scene of the shooting. However, this type of ammunition was common and easily found in sporting goods or gun stores.

East Side Pain was a criminal street gang, and its primary activities included homicide, attempted homicide, and narcotic sales. Members of the gang had been convicted of selling narcotics and assault with a firearm. One had been convicted of selling narcotics on the 1400 block of East Cruces Street while in the company of other gang members.

Officer Maldonado testified that as a gang officer, he came into contact with appellant formally and informally approximately 20 to 30 times prior to his arrest over a five-year period, mostly in traffic stops, the most recent of which was on February 14, 2007, while appellant was driving his gray Scion in the Ghost Town area. He conducted most of such stops in an unsuccessful attempt to obtain information about the gang. Officer Maldonado never had any problems with appellant.

Officer Maldonado testified that in his opinion, appellant was a member of East Side Pain. He based his opinion on his prior contacts with appellant while appellant was in the company of documented and admitted gang members, and the testimony in this trial regarding the location and nature of the crime. Further, appellant was arrested with Kyle, a known member of the gang, whose gang moniker was "Peanut." Finally, there were members of the gang in the audience during the preliminary hearing. Officer Maldonado identified one of them as Raymond Gains, appellant's cousin. Officer Maldonado acknowledged that having a gang-member father does not necessarily mean that the son is a gang member, nor does "hanging out" with relatives who are gang members. Shown a photograph of appellant in front of his father's house with four other persons, Officer Maldonado identified appellant's two stepbrothers and two documented East Side Pain gang members. He identified one as Raymond Gains, and the other as Kevin Garcia, whose gang moniker was "K-Dub." None of the persons depicted in the photograph wore red or gave a gang sign.

Officer Maldonado was also shown a photograph recovered during a search of the home of appellant's father. It depicted a red sheet marked, "All Dogs go to Heaven." Officer Maldonado had seen a similar photograph with older East Side Pain members,

taken at a funeral. This photograph also reinforced his belief that appellant was a gang member, although he did not know where in the house the photograph had been found.

It was also Officer Maldonado's opinion that "this crime" was committed for the benefit of the East Side Pain criminal street gang.⁴ He based his opinion on the location and circumstances of the crime. The area had been a known gang and narcotics area for over 30 years, and one of the primary activities of the gang was narcotic sales. For 30 years, the neighborhood had been controlled by four gang families, including the Coopers. In 2005, after a police investigation, the narcotics activity shifted from Cruces to O Street, where other gang families lived. After an undercover investigation lasting the first seven months of 2007, 45 members of the gang were taken into custody for narcotics trafficking, some with as much as \$24,000 in cash at their homes. Officer Maldonado described their operation as "making money hand over fist."

The gang did not allow nonmembers to sell in the area without paying taxes, because the gang earned its money in its territory, and they used that money to buy more narcotics, weapons to protect their narcotics, and whatever else they wanted. The gang maintained control of the neighborhood, although the members usually avoided shooting rivals in their own territory. Rival gang members came into East Side Pain territory periodically to shoot people, and when rival drug dealers or rival gang members came into their territory, East Side Pain members typically used violence and intimidation to keep them out. The gang would also use violence against drug buyers who did not pay. However, Officer Maldonado did not know why the victims in this case were shot, or whether the shooter was a gang member.

Officer Maldonado testified that he last spoke to appellant in 2007, when appellant was 18 years old. He acknowledged that appellant had never admitted to being a gang member and had no gang tattoos. He explained that many East Side Pain members did have tattoos, but in the past 15 years, since the courts began imposing sentencing

⁴ Officer Maldonado did not specify to which crime he referred—the shooting or the possession of marijuana.

enhancements and injunctions against gang members, fewer of them were getting tattoos or admitting to membership.

Officer Maldonado also acknowledged that he had never prepared a field identification card for appellant, as he did with known gang members, and had never seen appellant with spray paint. No other officers had reported that appellant was a gang member. Prior to appellant's arrest, Officer Maldonado had searched appellant's car approximately six times, but never found guns. He acknowledged that appellant had never been convicted of any gun-related crimes, although many members of the gang carried guns, and gun convictions were very common for them.

Officer Maldonado believed that appellant's father had been a gang member since the late 1980's, but did not think that the father's status necessarily meant that appellant was a member. Officer Maldonado believed that another son, appellant's brother Lorenzo, was not a gang member, but he believed that his brother Nelson was at least an associate, if not a member of the East Side Pain. He based his belief on the fact that Nelson had once been investigated for a shooting. Raymond Gains, appellant's cousin, was a member, but Officer Maldonado did not believe that associating with relatives who were gang members necessarily meant that appellant was a member.

4. The Defense

Appellant's high school coach and English teacher, Mr. L., testified that he coached appellant in freshman and sophomore football and track, and that he taught him English in the 12th grade. Mr. L. said that he could usually tell when students were involved in gangs, and never thought appellant was a gang member. Appellant was somewhat shy and quiet. Mr. L. never heard appellant say anything that sounded gang related, and he did not dress or act like a gang member. Appellant regularly attended school and maintained the necessary 2.0 or higher to remain in sports, at least through the 10th grade. Appellant spent his time with athletes, not students who looked like gang members. Students who were involved with gangs did not take Mr. L.'s class, African-American literature. His students were usually those interested in African-American

history. Mr. L. acknowledged that he had had no contact with appellant since June 2006, his senior year, and was not familiar with his reputation in the community since then.

Defense investigator Randall Petee testified that he observed the area of the shootings on three occasions, and saw several cars that resembled appellant's.

One of appellant's girlfriends, Timesha P., testified that appellant spent the night of the shooting at her home. She remembered the date because she had a hair appointment, and appellant gave her money for it. Timesha lived in a gated apartment complex with her mother and grandmother. Her grandmother was home that night, and could verify that appellant spent the night. Timesha testified that appellant arrived at 10:30 or 11:00 p.m., March 3, and did not leave her apartment until the next morning. Appellant parked his gray Scion in the back, behind an iron gate that blocked the driveway to the building's parking area. Timesha testified that the car must have remained there all night, because appellant did not have the remote to open the gate. He was there when she woke up at 10:00 or 11:00 a.m.

Appellant's other girlfriend, Jasmyne T., testified that she and Kyle T. were passengers in appellant's car when he was arrested on March 30, 2007. They had been driving around all night, because she had argued with her mother and did not want to go home. They were parked near the home of appellant's father, waiting for him to come home. They intended to stay at his father's house until his mother went to work, and then go to his mother's house, so that Jasmyne could dress there for school. As they waited, appellant and Kyle smoked marijuana, which they had just finished doing when the police knocked on the car window.

Jasmyne testified that she had known appellant for several years. She knew him well, and had never known him to be a gang member or a marijuana dealer, although many of appellant's friends were members of the East Side Pain gang. No one approached the car that night to try to buy narcotics, and the only marijuana she saw was the "joint" that appellant and Kyle smoked.

Jasmyne told the police that she had asked appellant how he could afford a nice car, with upgrades such as custom rims and a DVD player, when he had no job, and he replied that she should mind her own business. She testified that she understood the reply as a joke. She knew that his parents gave him money, and that his mother had bought him the car and the upgrades.

Appellant testified that he was not a gang member, and had never been in a gang, although he knew people in the East Side Pain, because he grew up in their neighborhood and had relatives in the gang. He grew up with Kyle, who was with him when he was arrested. Appellant claimed that his father, who was in prison at the time of trial for selling narcotics, was no longer a member of the gang. He did not know whether his cousin Raymond was a gang member—he never asked—and he denied selling narcotics with Raymond.

Appellant testified that he did not dress like a gang member, did not dress in red, and had no ties to the Bloods. The photograph of the red sheet was not his. When he asked his father about it, his father told him that it was his, and had been in an old photo album in his bedroom when the police seized it. Appellant identified himself and his brother, stepbrother, and cousin in the photograph taken in front of his father's house, and testified that Kevin, the fourth person, was a friend of his cousin Raymond Gains.

Appellant claimed that he did not own a gun and had never owned one. He pointed out that the police had searched his car many times without finding weapons or gang-related material. He explained that the police often pulled him over—more than 50 or 60 times—for such things as his tinted windows and seat belt violations. He denied that the bullets the police found were his, and claimed that he did not know how they came to be in his car. He found them in a cup holder, and put them in the special compartment that he had built into the door. The car had been a high school graduation gift from his parents, and his parents, brothers, and friends all had access to it. Appellant was enrolled at Cerritos Community College at the time of his arrest.

Appellant testified that he did not shoot anyone, and was not in the Ghost Town area the night of the shooting. At the time of his arrest, he lived with his mother in Long Beach, and often spent the night with Timesha, who lived in Torrance. He had lived in his father's house on Cruces Street before his parents separated until approximately junior high school.

Appellant testified that he was parked outside his father's house at the time he was arrested on March 30, 2007, waiting for his father to get home, because he did not have a key. He claimed that the marijuana found in his car was for his own consumption, although he had nothing in the car with which to roll it. He smoked it daily. Appellant admitted the amount was large, but explained that it was intended to last the weekend—three more days. He claimed that the marijuana was packaged as it was, because it was purchased that way, usually by various women who bought it for him. He claimed that he would throw the packets into a bag as he acquired them. He had been smoking marijuana in his car just before the police came, and was high at the time of his arrest.

Appellant claimed that some of the money recovered by the officers was not his, but Jasmyne's, and had been in her backpack when he was arrested. The rest had been given to him by his mother to buy clothes and shoes.

DISCUSSION

1. Standard of Review

Appellant's sole contention on appeal is that no substantial evidence supports the jury's true finding that he committed his crime—possession of marijuana for sale—“for the benefit of, at the direction of, and in association with any criminal street gang with the specific intent to promote, further, and assist in any criminal conduct by gang members,” within the meaning of section 186.22, subdivision (b)(1).

A gang enhancement finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*)). “[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence

which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*Ibid.*) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

2. *Expert Opinion Must Be Supported by Substantial Evidence*

Section 186.22, subdivision (b)(1), provides for enhanced sentences for persons convicted of gang-related felonies. (*People v. Gardeley* (1996) 14 Cal.4th 605, 622 (*Gardeley*).) The prosecution may prove the elements of the gang enhancement through expert testimony on criminal street gangs, as it did in this case. (*Id.* at pp. 617–620.)

The expert may render an opinion as to whether a crime is committed for the benefit of, at the direction of or in association with a criminal street gang, based on the facts of a hypothetical question, so long as the hypothetical is “rooted in facts shown by the evidence.” (*Id.* at p. 618.)

However, where, as here, the prosecution asks the expert whether the particular crimes were committed to benefit the defendant’s gang, without posing the question as a hypothetical, there is a ““risk that the jury might improperly consider [expert opinion testimony] as independent proof of the facts recited therein.” [Citation.]’ [Citation.]” (*Ochoa, supra*, 179 Cal.App.4th at p. 664, quoting *Gardeley*, at p. 619.) Thus, a finding that an offense was gang related may not be based solely upon a gang expert’s testimony. (*Ochoa, supra*, at p. 657.) “[S]ome substantive factual evidentiary basis, not speculation, must support an expert witness’s opinion.” (*Id.* at p. 661, fn. omitted.)

Further, the evidentiary support must be more “than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a

criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762; see also *Ochoa, supra*, 179 Cal.App.4th at p. 657; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) “[S]ome substantive factual evidentiary basis, not speculation, must support an expert witness’s opinion.” (*Ochoa, supra*, at p. 661, fn. omitted.)

3. *No Substantial Evidence Supports the Expert’s Opinion*

Section 186.22, subdivision (b)(1), has two prongs, both of which the prosecution must prove: (1) The crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Here, Officer Maldonado gave his opinion on the first prong of section 186.22, subdivision (b)(1): He believed that East Side Pain was a criminal street gang, and that “this crime” was committed for the benefit of the gang.

When speaking of “this crime” in the singular, Officer Maldonado did not make clear whether he meant that the shooting was gang related or whether appellant’s possession of marijuana was gang related. It appeared to be the shooting, as he explained his opinion by speaking of the gang’s custom of using gun violence to maintain control of the neighborhood, and the custom of the gang not to permit nongang members to sell drugs in its territory.

Officer Maldonado did not tie the shooting in any way to the drugs appellant possessed at the time of his arrest.⁵ However, he also testified that he based his opinion on the location of the crime in East Side Pain territory, and the fact that one of the gang’s primary activities was selling narcotics, as well as his opinion that appellant was a member of the gang.

We assume for discussion that Officer Maldonado intended his testimony to express the opinion that appellant’s possession of marijuana for sale, not just the

⁵ In summation, the prosecutor did not argue that appellant’s possession for sale was intended to benefit the gang or that it was committed in association with a gang member.

shooting, was meant to benefit the gang. An opinion that a crime was meant to benefit a gang will justify the enhancement only if it is supported by substantial evidence connecting the defendant's particular crime with the activities of a gang. (*People v. Martinez, supra*, 116 Cal.App.4th at p. 757.) We find no substantial evidence of such a connection.

Appellant was parked down the street from his father's home, where he was known by the police to stay or reside.⁶ Although the amount and packaging of the marijuana gave rise to a reasonable inference that appellant possessed the marijuana with the intent to sell it at some time and place, he was not observed selling the drugs while in gang territory. Mere possession of contraband in gang territory does not make the crime gang related. (See *People v. Ramon* (2009) 175 Cal.App.4th 843, 853.)

At the core of Officer Maldonado's opinion was his belief that appellant was a member of East Side Pain. However, appellant was not a documented gang member. He wore no gang clothing or tattoos, and had never been seen making gang signs. He neither admitted to being in a gang nor made any gang-related statements, and he had never been found with gang materials or guns. Appellant had no known history of committing gang-related crimes or taking part in gang-related activity, and law enforcement had created no field identification card showing him to be a gang member. In short, nothing connects appellant to the gang other than his presence on the block where he grew up and where his father lives, and his having gang-member relatives and a gang-member friend.

Appellant's personal affiliations may be relevant when viewed with evidence of a defendant's criminal record or past participation in gang activities. (*People v. Martinez, supra*, 116 Cal.App.4th at p. 762.) However, appellant did not have a criminal record, and there was no evidence of past participation in gang activities. Mere affiliation with gang members does not make a crime gang related where there is no evidence connecting appellant's crime with the activities of a gang. (*Id.* at p. 757.) A gang enhancement

⁶ Officer Nua testified that appellant parked on Cruces Street "some distance" from the home of appellant's father, but did not say that closer spaces were available.

cannot be sustained solely on evidence that the defendant was a member of the gang when he committed his crime. (*Ochoa, supra*, 179 Cal.App.4th at p. 663.) Here, the evidence showed only a possibility that appellant was a member of the gang. “[A] mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]” (*People v. Ramon, supra*, 175 Cal.App.4th at p. 851.)

Further, in addition to showing that the crime was committed for the benefit of, at the direction of or in association with the gang, the prosecution was also required to show that appellant committed the crime with the specific intent to promote, further, or assist in any criminal conduct by gang members. (See § 186.22, subd. (b)(1); *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322.) Specific intent may be shown by evidence of gang membership and an intent to commit a crime in gang territory. (See *People v. Ferraez, supra*, 112 Cal.App.4th at p. 931 [defendant admitted that he was a member of a gang and that he intended to sell drugs in gang territory].) Here, however, the expert’s opinion that appellant was a gang member was not supported by substantial evidence, and although there was substantial evidence of appellant’s intent to sell marijuana, it was not shown that he intended to do so in East Side Pain territory.

Respondent contends that the evidence establishing that appellant possessed marijuana with the intent to sell it, along with the fact that he committed that crime in the presence of Kyle, a documented gang member, adequately supported the jury’s finding that appellant harbored the specific intent to promote, further, or assist in criminal conduct by gang members. Respondent points out that the “[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Respondent does not, however, point to evidence showing that appellant committed his crime *in concert* with Kyle, or that Kyle even knew that appellant was in possession of any marijuana other than the joint they smoked together, which they

obviously did not possess to sell. The marijuana had been placed in the driver's side door compartment, and the apparent proceeds from sales were in the center console. We found no evidence suggesting that either was visible to Kyle.

A person does not participate in the crime of possession of narcotics without knowing that the narcotics are present. (See *People v. Montero* (2007) 155 Cal.App.4th 1170, 1176.) Committing a crime in gang territory in the presence of a gang member, without more, is inadequate to establish that the defendant committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members. (*People v. Ramon, supra*, 175 Cal.App.4th at p. 851.) The record must contain evidence that appellant was not merely acting on his own behalf. (*Ibid.*) The record did not contain such evidence in this case.

We conclude that substantial evidence did not support Officer Maldonado's opinion that appellant's crime was connected to the gang's activities, or the finding that by possessing marijuana for sale, appellant intended to promote, further, or assist in any criminal conduct by gang members. (See § 186.22, subd. (b)(1); *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322.) Thus, the gang enhancement must be reversed. (See *Ochoa, supra*, 179 Cal.App.4th at p. 665.)

DISPOSITION

The true finding pursuant to section 186.22, subdivision (b)(i), is reversed, and the sentence enhancement is stricken. The judgment is otherwise affirmed. On remand, the trial court is directed to correct the abstract of judgment accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

I concur:

_____, J.
ASHMANN-GERST

I dissent.

The majority concludes that there was insufficient evidence of the section 186.22, subdivision (b)(1) enhancement to support the jury's finding. I disagree.

As mentioned by the majority, a gang enhancement finding is reviewed under the same substantial evidence standard as any other conviction. (*People v Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*)). An appellate court must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v Kraft* (2000) 23 Cal.4th 978, 1053.) The evidence is not reweighed nor are conflicts in the evidence resolved. (*People v Young* (2005) 34 Cal.4th 1149, 1181.)

Appellant argues that Officer Maldonado gave an improper opinion that was not supported by the evidence. At trial the prosecution may present expert testimony on the culture and habits of criminal street gangs (*People v Gardeley* (1996) 14 Cal.4th 605, 617-620), including “the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant’s membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citations], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations].” (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, fns. omitted.) “Expert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions. [Citation.] Thus, a gang expert may rely upon conversations with gang members, his or her personal investigations or gang-related crimes, and information obtained from colleagues and other law enforcement agencies. [Citations.] Likewise, and individual’s membership in a criminal street gang is a proper subject for expert testimony. [Citations.]” (*People v Duran* (2002) 97 Cal.App.4th 1448, 1463-1464;

People v Valdez (1997) 58 Cal.App.4th 494, 506.) Expert testimony is admissible even if it encompasses the ultimate issue in the case. (*People v Olguin* (1994) 31 Cal.App.4th 1355, 1371.)

Contrary to the majority, I believe that the evidence presented here is sufficient to support the expert's opinion that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, and established both prongs of section 186.22, subdivision (b)(1).

The commission of a crime of the kind commonly committed by a certain gang, in concert with one or more members of that gang, provides evidence of both prongs. (*People v Morales* (2003) 112 Cal.App.4th 1176, 1198.) Independent evidence supported the gang expert, Officer Maldonado's opinion that East Side Pain (ESP) is a criminal street gang with approximately 80 members that primarily engages in criminal conduct involving violence and narcotic sales. Officer Maldonado, who had known of this gang for over 10 years was of the opinion that appellant was a member of ESP based on many personal contacts with appellant at known ESP locations; that in the past appellant was observed in the company of other documented ESP members; that appellant was arrested for this offense in the company of an ESP gang member at a location which is significant to ESP; and due to the fact that other ESP gang members were present in the courtroom during both the preliminary hearing and at trial. It was also significant that appellant's father and stepbrothers were well known members of ESP whose home, in the ESP territory, was a well known ESP haunt.

Officer Maldonado was also of the opinion that the crime committed was for the benefit of ESP based on the evidence of the location of the crime and the fact that narcotic sales was a primary activity of ESP. The gang expert observed that ESP, and the territory it claimed, was "one of the more unique I've ever come across." The location of this gang territory was such that the gang could monitor nearly all of the traffic coming into the area and keep track of all of the narcotic sales in their claimed territory. He

explained that ESP would not allow others to sell drugs in their territory without paying the gang as to do so would be a loss of control or a sign of weakness.

The same evidence showed the second prong of the gang enhancement -- that appellant harbored the specific intent to assist another gang member in the commission of the crime. “Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]” (*People v Villalobos, supra*, 145 Cal.App.4th at p. 322.) Here appellant and was arrested in the company of an ESP gang member, while the two of them (and a girlfriend) were together in a parked automobile frequently driven by appellant, near the home of appellant’s father in ESP territory.

Appellant cites several cases in which expert opinions were held not to have a sufficient evidentiary basis, and contends that the facts of this case are even less substantial. (See *People v Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); *In re Frank S.* (2006) 141 Cal.App.4th 1192.) I disagree and find them inapposite. In *Ramon*, two gang members were stopped in a stolen truck in their gang’s territory and an unregistered firearm was recovered from under the driver’s seat. (*Ramon, supra*, at pp. 846-847.) The appellate court reversed the gang enhancement, holding that the facts were insufficient to show that the two harbored the specific intent to promote, further, or assist criminal conduct by gang members. (*Id.* at pp. 851-852.) The court noted however, that its “analysis might be different if the expert’s opinion had included ‘possessing stolen vehicles’ as one of the activities of the gang.” (*Id.* at p. 853.) Here, there is evidence that narcotic sales are the primary type of crimes committed by ESP, a circumstance which supports the jury’s finding of specific intent.

Therefore, I conclude that the true gang finding was supported by substantial evidence and I would affirm the judgment.

_____, J.
CHAVEZ